LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
AUG 13 1975
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-233

ROBERT J. DeCHIARO,
ROBERT G. LUTZ,
PETITIONERS,

v.

THE STATE OF NEW YORK,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT

GERALD ALCH, ESQUIRE
One Center Plaza
Boston, Massachusetts 02108
Attorney for Petitioners

August 12, 1975

Blanchard Press, Inc., Boston, Mass. — Law Printers

TABLE OF CONTENTS

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statement of the Case	3
Reasons For Granting the Writ	18
I. The decision below raises an important question of federal constitutional law as to the proper interpretation of the Sixth Amendment right to counsel, conflicts with the decisions of the lower federal courts and should be settled by this Court.	18
II. The decision below raises an important question of federal constitutional law as to the proper interpretation of the Sixth Amendment right to confrontation and to cross-examination to show prejudice, interest or bias of a prosecution witness.	25
Conclusion	30
Appendix	31
Opinion of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department.	31
Certificate denying leave to appeal to the Court of Appeals of the State of New York	37

TABLE OF AUTHORITIES

Cases

Boykin v. *Alabama*, 395 U.S. 238, 243 (1969)	19
Brookhart v. *Janis*, 384 U.S. 1, 3	28
Carnley v. *Cochran*, 369 U.S. 506, 515 (1962)	19

Page

Davis v. *Alaska*, ___ U.S. ___, 94 S.Ct. 1105 (1974) .. 27, 28
DesBouillons v. *Burke*, 418 F.2d 297 (7th Cir. 1969) .. 19
Douglas v. *Alabama*, 380 U.S. 415, 418 (1965) 28
Gideon v. *Wainwright*, 372 U.S. 335 (1963) 19
Johnson v. *Zerbst*, 304 U.S. 458, 464 (1938) 19, 20
Meeks v. *Craven*, 482 F.2d 465 (9th Cir. 1973) 19
Patton v. *State of North Carolina*, 315 F.2d 643 (4th Cir. 1963) 20, 21
People v. *McDowell*, 210 N.Y.S.2d 514, 9 N.Y.2d 12 (1961) 29
Pointer v. *Texas*, 380 U.S. 400 (1965) 27
Smith v. *Illinois*, 390 U.S. 129, 131 (1968) 28
Soto v. *United States*, 369 F.Supp. 232, 236 (E.D.Pa. 1973) 19, 24
United States v. *Battaglia*, 394 F.2d 304, 314, n. 7 (7th Cir. 1968) 29
United States v. *Curtiss*, 330 F.2d 278 (2d Cir. 1964) .. 23
United States v. *Fay*, 364 F.2d 219 (2d Cir. 1966) 19, 23, 24
United States v. *Haggett*, 438 F.2d 396 (2d Cir. 1971) 29
United States v. *McMann*, 252 F.Supp. 539, 545 (N.D. N.Y. 1966) 21, 22, 23
Villaroman v. *United States*, 184 F.2d 261 (D.C. Cir. 1950) 29

Constitutional Provisions

United States Constitution,
Amendment VI 2, 3, 18, 19, 25
Amendment XIV 2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75

ROBERT J. DeCHIARO,
ROBERT G. LUTZ,
PETITIONERS,

v.

THE STATE OF NEW YORK,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT

The petitioners Robert J. DeChiaro and Robert G. Lutz respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department entered in this proceeding on May 12, 1975.

Opinion Below

The opinion of the Appellate Division, not yet reported, appears in the Appendix hereto. No opinion was rendered by the State of New York of Appeals.

Jurisdiction

The judgment of the Supreme Court, Appellate Division, Third Judicial Department was entered on May 12, 1975. It appears in the Appendix. On May 16, 1975 the Honorable Hugh R. Jones, Associate Judge of the Court of Appeals of the State of New York denied petitioners timely application for a certificate of appeal to that Court. It also appears in the Appendix. Thereafter, within 90 days of that date this petition for certiorari was filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Questions Presented

1. Whether petitioners were denied the assistance of counsel in their defense as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United Staates.

2. Whether the trial court's refusal to permit the introduction of evidence of alleged brutality inflicted upon the petitioners by New York State Troopers who were prosecution witnesses and evidence of a civil rights action instituted by petitioners against the arresting officers to show bias or hostility deprived petitioners of their right to confrontation and cross-examination as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States.

Constitutional Provisions Involved

United States Constitution:

Amendment VI.

"In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him; . . . and to have the assistance of counsel for his defense."

Amendment XIV.

". . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

Statement of the Case

In May, 1973, the petitioners were indicted by a Rensselaer County grand jury, indictment No. C-4224 and charged with the crimes of burglary in the first degree and attempted robbery in the first degree. Petitioners were convicted on September 16, 1974 of both counts following a jury trial in which neither petitioner was represented by counsel. Petitioners were sentenced on September 30, 1974, to indeterminate terms not exceeding 25 years on the burglary conviction and to concurrent indeterminate terms not exceeding 15 years on the robbery convictions.

Thereafter, petitioners appealed to the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, and by decision dated May 8, 1975, and entered May 12, 1975, petitioners' convictions were affirmed. On May 16, 1975, petitioners' application for a certificate of appeal to the Court of Appeals of the State

of New York was denied by the Honorable Hugh R. Jones, Associate Judge of that Court.

Following their arrest in January 1973, petitioner Lutz retained attorney E. Stewart Jones, Jr., and petitioner DeChiaro retained attorney Thomas J. O'Connor, both of Troy, New York. Counsel for petitioners made various pretrial motions including a motion to suppress their alleged confessions made following their arrest and allegedly coerced through brutal beatings inflicted by numerous New York State Troopers.

On September 5, 1974, defense counsel were advised by Judge Clyne (Albany County Court Judge, who had been assigned to Rensselaer County Court to preside over the instant trial since newly elected Rensselaer County Judge Cholakis had been the District Attorney at the time of the return of the instant indictment), that the confession suppression hearing scheduled for September 6, 1974, would not be held since the prosecution had made known its intention not to offer the alleged confessions as either direct or rebuttal evidence.

Defense counsel were advised at the same time that the trial would commence on September 9, 1974, despite the fact that the Special Prosecutor, Mr. Shanley had not yet fully complied with a previously granted defense Motion for Discovery and Inspection. Nor had two other pending motions for suppression of Identification Testimony and Dismissal of the Indictment for selective and discriminatory prosecution yet been ruled on.

On September 7, 1974, an Order To Show Cause staying the trial pending a Change of Venue Application was signed by the Honorable Michael Sweeney, an Associate Justice of the Appellate Division, Third Department. Upon being so advised, Judge Clyne scheduled September 9, 1974 for a Supression Identification Hearing. On the afternoon of September 9, 1974, while said Suppression Identi-

fication Hearing was in progress, Judge Clyne denied the motions to dismiss the indictment. At 1:30 P.M. on that day, arguments had been heard by the Appellate Division, Third Department, on the Change of Venue Application which was subsequently denied by that Court at approximately 4:30 P.M. on September 9, 1974.

On Tuesday morning, September 10, 1974, immediately prior to the resumption of the Identification Suppression Hearing, the petitioners advised their attorneys that they wished to discharge them and retain new counsel, with petitioner Lutz assigning as one of his reasons therefor the appearance of conflict in interest arising out of the continuing responsibility of Attorney Jones as Special Prosecutor in Rensselaer County. At this time, Mr. Shanley had still not provided defense counsel with a copy of the New York State Police Laboratory Analysis of the hair samples in compliance with the terms of the Discovery Order entered on July 6, 1974, which was believed to reflect critical exculpatory evidence for the petitioners.

At the commencement of proceedings on September 10, 1974, defense counsel advised Judge Clyne of their having been discharged by the petitioners and further stated that they had been told by the petitioners of the retention of the Law Office of F. Lee Bailey, Esquire, of Boston, Massachusetts, to represent them for that point on. A request for a continuance of the hearing then in progress was made by Attorney Jones in order to facilitate the change of counsel. Judge Clyne denied the motion labelling it as "frivolous" and a "fraud upon the Court." Judge Clyne offered the petitioners the alternatives of either conducting the hearings pro se, or of producing an attorney from the Bailey Office in Court "within the next fifteen minutes." When advised of the impossibility of effectuating the latter alternative Judge Clyne recessed for five minutes during which time he directed that the petitioners decide either

to continue pro se or with their original defense counsel. When Court resumed, subsequent to the five minute recess, Judge Clyne advised that as a result of a telephonic contact with the office of Attorney Bailey, it was his understanding that a member of the Bailey firm would be present the following morning prepared to commence jury selection. With the petitioners insisting on their right to be represented by new counsel, the Court directed that the Suppression Identification Hearing be resumed with the petitioners representing themselves. The colloquy between Judge Clyne, defense counsel and petitioners, pertaining to this issue is reflected on pages 144 through 156. Judge Clyne discharged Attorneys Jones and O'Connor from the case and when the petitioners stated to him that they did not wish to represent themselves, declared "you are just going to sit here; that is what you are going to do." (T.T. 155, 156).

Excerpts from the trial transcript reveal the following relevant exchanges:

> Mr. Jones: It is my understanding that I have been effectively discharged as Mr. Lutz' attorney.
>
> The Court: Very well, then Mr. Lutz can conduct the matter himself or he can have Mr. Bailey here within the next fifteen minutes.
>
> Mr. Jones: Obvously, that's an impossibility, Judge, from Boston to Troy.
>
> The Court: That is not. If he spoke with Mr. Bailey last night and advised him this hearing was on this day, if Mr. Bailey was going to effectively represent his client he would have been here this morning. Now, who's kidding who? That's it.

(T.T. 146). Thereafter the Court declared that the trial would commence the following day and ordered a five minute recess for counsel to decide "whether you will

continue to represent your clients for the balance of this hearing or whether they want to represent themselves." (T.T. 147).

When the hearing resumed the Court addressed defense counsel:

> The Court strongly recommends that respective counsel continue to fulfill their professional responsibilities in this matter for the balance of this date so there will be an orderly transition of the file from the old counsel to the new counsel who will be here, because in no event will the trial of this case be further delayed.

(T.T. 148). Counsel responded that their clients continued to move for a continuance until new counsel could be present. (T.T. 149, 150). Counsel further indicated that petitioners desired to be heard and the following colloquy ensued:

> Defendant Lutz: Your Honor, because of Mr. — I come to the conclusion, because of Mr. Jones being a special prosecutor, he — there is a conflict of interests.
>
> The Court: Who are you kidding? Mr. Jones was special prosecutor when? When I was here in June with Shaw? It took you from that time to this time to make that determination? Do you want to continue to have Mr. Jones continue to represent you for the balance of this hearing or do you want to represent yourself?
>
> • • •
>
> Defendant Lutz: Your Honor, he is not the lawyer of my choice.
>
> The Court: Very well. Then you will represent yourself. Fine. You wish to make a statement, Mr. DeChiaro?

Defendant DeChiaro: I feel, Your Honor, the association between Mr. O'Connor and Mr. Stewart Jones is the same. I don't believe I can represent myself. I don't have the law behind me to do so. I would like to have this on the record, that's all.

The Court: Very well. I would strongly urge you to have Mr. O'Connor represent you for the balance of this suppression hearing.

Defendant DeChiaro: What if we don't get the suppression hearing?

The Court: I am giving you the suppression hearing pursuant to the motion made by your counsel. Do you wish to withwraw your motion for a suppression hearing?

Defendant DeChiaro: No.

• • •

The Court: Very well. We will continue with the suppression hearing. Now, gentlemen, please; this matter involves an alleged crime committed on January 28, 1973. The indictments in this case were returned May 1, 1973. This is now September 10, 1974; more than ample time has passed for defendants to have made their choice of counsel. As you are well aware, you are represented by extremely competent counsel and you have made that choice yourself from the very beginning in this case. In addition, the argument about Mr. Jones having been a special prosecutor falls on deaf ears for the reason that Mr. Jones —

Defendant DeChiaro: I am not saying that, Your Honor.

The Court: I will spell it out for you. I am not impressed with the argument. Mr. Jones was special prosecutor in June of 1974. This is September. . . . This Court has come to the conclusion that the tactic seeking a change of venue was for the purpose

of delay. . . . This Court is of the further opinion that the last-minute switch of attorneys on the very eve of trial is for the same reason. Delay will no longer be tolerated in this case.

Defendant DeChiaro: Your Honor —

The Court: This case is now scheduled to begin tomorrow morning at 9:30 with the selection of a jury, and all things being equal and God willing such will happen.

Defendant DeChiaro: Your Honor, it hasn't been brought to my attention until I read in the papers the other day next to a murder trial, he is the prosecuting attorney, and our case is defense.

The Court: That's been in the papers for all this past year. Very well, Mr. DeChiaro, you have had your statement. Do you wish to say anything further?

Defendant Lutz: I do, Your Honor.

• • •

I retained Mr. Jones as my lawyer. He was a [defense] lawyer. A few months ago he began special prosecutor. He changed his status.

The Court: He was appointed special prosecutor in this county in March of 1974. Now please stop trying to flimflam the Court.

Defendant Lutz: I am just saying there is a conflict of interests, and I don't want him for my attorney. That's all I have to say.

The Court: That's very good.

Defendant Lutz: Today either.

The Court: You do not wish to have either —

Defendant Lutz: All he wants is a twenty-four hour continuance until tomorrow. Mr. Alch will be here tomorrow morning.

The Court: Mr. Alch will be here tomorrow morning to begin selection of a jury. We are going forward

with this suppression hearing. We are going forward at this time with or without counsel.

Defendant DeChiaro: If that's the way it's got to be, that's the way it's got to be.

The Court: *You wish to represent yourself?*

Defendant DeChiaro: *We don't wish to represent ourselves.* Our rights are being denied further.

The Court: Is that your position?

Defendant Lutz: That's our position.

The Court: Fine. Mr. Jones and Mr. O'Connor are not going to represent you for the balance of this suppression hearing?

Defendant Lutz: No.

The Court: Very well. Is that the same with you, Mr. DeChiaro?

Defendant DeChiaro: The same.

The Court: Very well. In view of the statements of the defendants, Mr. Jones and Mr. O'Connor, you are discharged from further service in this case. Very well. Call your next witness, please, Mr. Shanley.

Defendant Lutz: *We are not going to represent ourselves either.*

The Court: You are just going to sit here; that's what you are going to do.

Defendant Lutz: We don't wish to carry on with the suppression hearing.

The Court: You don't have anything to say about it. Take your seat.

(T.T. 150-156).

The hearing continued and was concluded on September 10, 1974 in the absence of the petitioners being represented by counsel as hereinabove set forth. Petitioners continued to object, for the balance of the hearing, that they were not represented by counsel.

Attorney Gerald Alch, then of Mr. Bailey's Law Firm had booked passage on an Allegheny Airlines Flight from Boston to Albany, scheduled to arrive in Albany at 7:42 a.m. on September 11, 1974. This flight was cancelled because of the Albany airport being closed due to fog. At approximately 9:15 a.m. on September 11, 1974, Alch telephoned Judge Clyne and explained the problem to him, stating that he had acquired passage on the next available flight which was scheduled to arrive in Albany at approximately 3:25 p.m. Judge Clyne replied to Alch that he had a problem in that the case was scheduled to commence trial on that day and that he had, on the day before, permitted defense attorneys of record to withdraw. He further stated that the problem was compound because he "didn't know whether Alch was in or out of the case" and he presumed that Alch "would not be willing to represent the defendants without getting paid." Alch responded that the primary factor was whether or not he could obtain a continuance in order to adequately prepare for the case. Judge Clyne stated that jury picking had been scheduled to commence that morning but that he might consider a delay with regard to the introduction of evidence until Monday, September 16, 1974. Alch stated if he could receive more time whereupon Judge Clyne stated that he would further discuss the matter with Alch in chambers that afternoon.

Before leaving for Albany on September 11, 1974, Alch telephoned Attorney Jones for the purpose of obtaining general information regarding the case which would serve as a predicate for an evaluation of the minimum time necessary for preparation. Discussed was the fact that the petitioners had instituted a civil rights action in the United States District Court in Albany, New York against several New York State Troopers, the arresting officers in the case, based upon alleged vicious and brutal assaults at the time of and immediately subsequent to the arrest of the peti-

tioners. It was the opinion of both Jones and Alch that evidence of this alleged brutality would be admissible, the non-proffer of the alleged confessions by the prosecution notwithstanding, on the issue of hostility, interest and bias on the part of the arresting officers (defendants in the civil suit) whose alleged identification of the petitioners at the time of the charged offense was a crucial issue in the case. Jones further advised Alch that in order to adequately prepare for trial it would be necessary to review a preliminary hearing transcript of approximately two hundred pages, a transcript of the Identification Suppression Hearing (which was not yet available) to interview deputy sheriffs who had allegedly observed the condition of the petitioners upon their delivery by the State Police for booking purposes, to interview doctors who had treated the petitioners during their post-arrest hospitalization, to interview reporters under whose by-line newspaper articles had appeared purporting to quote several of the arresting officers in statements inconsistent with testimony adduced at pre-trial hearings, to interview FBI Agents who had investigated the charges of brutality, to review all pertinent hospital records, as well as all records obtainable relating to the investigation by the FBI and by the Internal Affairs Division of the State Police. Accordingly, Alch concluded that the minimum time necessary for preparations sufficient for adequate representation would be seven (7) calendar days.

At approximately 3:45 p.m. on September 11, 1974, Alch, his associate, John A. Daly, Esquire, and Shanley met with Judge Clyne in Chambers. Alch explained to Judge Clyne the basis for his continuance request of seven calendar days, as hereinabove set forth. Judge Clyne stated that evidence of the alleged State Police brutality was inadmissible in view of the alleged confessions having been voluntarily suppressed by the prosecutor. Judge Clyne further

stated that such evidence would also be refused on the issue of prejudice or bias of any testifying State Trooper who had been named as defendants in the Federal Civil Action, Alch responded that it would be his obligation, in the event of such an evidentiary ruling during trial, to make an offer of proof, as specific as possible, as to the substance of the proffered testimonial documentary evidence with regard to the alleged brutality and its alleged relevancy to the bias of prosecution witnesses. Judge Clyne stated that a defendant did not enjoy the privilege of making an offer of proof, and that same was afforded only to the prosecution. Alch respectfully disagreed and requested a continuance until Thursday, September 19, 1974, avowing to devote his efforts exclusively during this period of time to the preparation of the instant trial. Judge Clyne stated that jury selection would commence the following day, September 12, 1974, which he assured would be completed by 2 p.m. of that day. Alch stated that his requested preparation was necessary for the proper formulation of voir dire questions to the Petit Panel and that in any event, completion of jury selection could not be guaranteed by 2 p.m. on the day said process was to commence. Judge Clyne told Alch that all he had to do was enter his appearance, request a continuance for the record, which he would deny, and that Alch would thereby "be protected." Alch stated that his concern was for the protection of the petitioners and that it was probable that jury selection would run into Friday, September 13, 1974, which even if completed on that day, would afford him only the two days of the weekend to prepare and interview many witnesses whose weekend availability was uncertain. Judge Clyne told Alch that if his best efforts were exerted, the defendants would thereby be afforded a fair trial; to which Alch replied that the question of preparation was a subjective matter of conscience and that he could

not assume the responsibility of two young defendants faced with Class B felonies unless he felt personally ready to proceed. Judge Clyne ended the discussion by stating that he did not grant the request for a continuance of seven calendar days and gave Alch thirty minutes in which to reach a decision with regard to his representation of the petitioners.

Alch went to the office of Jones who advised that on the day before, when the petitioners had discharged him and O'Connor in open court, Judge Clyne's immediate reaction had not been to permit their withdrawal but was rather to telephonically contact Attorney Bailey in Boston. It was subsequent to this conversation, in which Bailey professed to have no knowledge of the situation, that Judge Clyne returned to open court and allow the attorneys of record to withdraw.

Alch returned to Judge Clyne's chambers at 5:15 p.m. and advised of his decision, under the circumstances, not to enter his appearance on behalf of the petitioners. Judge Clyne directed Alch to summon Attorneys Jones and O'Connor as well as the petitioners to his courtroom. While awaiting their arrival, having emerged from Judge's Chambers, Judge Clyne beckoned Alch, alone, back into his office. Attorney Daly accompanied Alch into chambers whereupon Judge Clyne stated, in the absence of Mr. Shanley, that if Alch refused to then enter his appearance, he would seriously consider forwarding a copy of the record about to be made in open court to the Massachusetts Bar Association, citing Alch for unprofessional conduct.

All parties then proceeded to the courtroom for the purpose of making a record of all that had transpired. (Transcript of September 11, 1974, proceedings [hereinafter cited as T 11.]).

When attorney Alch refused to enter his appearance on the grounds that adequate time for trial preparation of

seven days was denied, Judge Clyne directed that attorneys Jones and O'Connor, who were present in the courtroom, resume representation of the petitioners. Almost immediately thereafter Judge Clyne reversed himself and withdrew this direction.

Defendant Lutz: I discharged my lawyer for what I thought, and what I still do think, on the very valid grounds—

The Court: (Interrupting) Very well.

Defendant Lutz: (Continuing) —in the conflict of interests.

The Court: I don't agree with you and there is not any conflict of interests. In any event, do you want to reconsider, go forward with Mr. Jones and Mr. O'Connor respectively, gentlemen, or no?

Defendant Lutz: The lawyer of my choice is Mr. Alch.

The Court: Well he does not appear to have the same feeling.

Defendant Lutz: May I speak, Your Honor?

The Court: Make it brief.

Defendant Lutz: I am in a position to obtain Mr. Alch as my attorney and I understand if he has the proper time to prepare this case—

The Court: (Interrupting) That is water over the dam, I have decided that already. We are going to draw a jury in this case tomorrow morning. Get to the point.

Defendant Lutz: I don't have a lawyer.

The Court: Then you be here tomorrow morning ready to try it yourself.

How about you?

Defendant DeChiaro: I don't have a lawyer and I do not intend to be here tomorrow.

The Court: You be here in the morning and try it yourself.

Under the circumstances I am appointing Mr. Jones to aid and assist Mr. Lutz during the trial of this case. The degree of cooperation will depend upon the defendant's own choice. I am also designating Mr. O'Connor to aid and assist Mr. DiChiaro in the trial of this case and the degree of cooperation will depend upon the defendant's own actions.

Male Voice: May I speak to the Bench—

The Court: You open your mouth and you will be in Contempt of Court.

Mr. Jones: Your Honor, in the face of the discharge—

The Court: (Interrupting) Mr. Jones, the Court has designated you—

Mr. Jones: I don't see how I can accept the appointment.

The Court: I don't think you have any choice, I designated you to do so.

Mr. Jones: I think you have exceeded your authority. I ask for an opportunity to appear before the Appellate Division to pass upon it.

The Court: I am not going to give you that opportunity, you are the attorney best able to aid and assist this defendant—

Mr. Jones: (Interrupting) I disagree, I am presently discharged from this case, discharged with the sanction of the Court—

The Court: That is true but times have changed and we are right back again.

Mr. Jones: You are appointing me to represent —to appear for someone who has discharged me?

The Court: Do you object?

Defendant Lutz: I strongly object.

The Court: Do you strongly object?

Defendant DeChiaro: I do object.

The Court: Gentlemen you are on your own, you have no attorney, you are on your own.

You will be here tomorrow morning at 10:00 a.m., we select a jury in this case. That's all.

Defendant Lutz: You mean that I have to defend myself in a criminal action?

The Court: That is it exactly.

Defendant DeChiaro: You are telling us that we have to defend ourselves?

The Court: That is exactly what I am telling you. (T. 11. 25-29).

Trial of the petitioners commenced with jury selection on September 12, 1974 without the petitioners being represented by counsel. During the course of the trial, whenever Judge Clyne inquired of the petitioners as to whether they wished to participate via cross-examination, objections, etc., the petitioners constantly repeated, on at least seventy-two (72) occasions, their desire to be represented by adequately prepared counsel, other than Attorneys Jones and O'Connor, whom they had discharged.

At one point, during trial, the record reflects that the petitioners stated to Judge Clyne that if they were represented by adequately prepared counsel, they would request that he attempt to introduce evidence of the alleged State Trooper brutality on the issue of bias on the part of the prosecution witnesses. The response of Judge Clyne was to the effect that this matter had already been judicially adjudicated in the negative. This colloquy is reflected on page 333 of the trial transcript.

There were also several instances during trial where competent counsel, it must be assumed, would have posed objections with regard to the manner in which the trial

was prosecuted, which objections, it is respectfully submitted, would or should have been well taken. Upon the return by the jury of a verdict of guilty on September 16, 1974, the petitioners were immediately remanded by Judge Clyne until their release pending appeal by Associate Justice T. Paul Kane of this Court on September 17, 1974.

By decision dated May 8, and entered May 12, 1975, the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, affirmed petitioners' convictions in a decision which appears in the Appendix hereto. That Court held that, "Prior to the commencement of the trial, the defendants elected to proceed without counsel although during the voir dire they attempted to change their position. The trial commenced the next morning without defense counsel and the defendants, not participating in the trial, were convicted . . . ." further, the Court held that petitioners had discharged their attorneys without good cause and that "Defendants' decisions to forego any representation or to assert any defense in the trial were equivalent to an express waiver of counsel."

The Appellate Division also ruled that the issue of the admissibility of the alleged brutality of the arresting officers and the institution of the Civil Rights Action by petitioners could not be raised upon appeal since it "never became a subject of a formal ruling . . . ."

Reasons for Granting the Writ

I. The Decision Below Raises an Important Question of Federal Constitutional Law as to the Proper Interpretation of the Sixth Amendment Right to Counsel, Conflicts With the Decisions of the Lower Federal Courts, and Should Be Settled by This Court.

The Sixth Amendment to the Constitution of the United States guarantees that:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

This mandate is of course binding upon the states. *Gideon* v. *Wainwright,* 372 U.S. 335 (1963). While recognizing that a criminal defendant has a right to counsel under the New York Constitution (N.Y. Const., Art. I, §60) the ratione decidendi of the Appellate Division was a waiver of this right. "Defendants' decisions to forego any representation or to assert any defense in the trial were equivalent to an express waiver of counsel . . . ."

The question of an effective waiver of a federal constitutional right, however, is itself a federal standards question. *Boykin* v. *Alabama,* 395 U.S. 238, 243 (1969); *Des Bouillons* v. *Burke,* 418 F.2d 297 (7th Cir. 1969).

With respect to the issue of waiver, this Court long ago stated that courts must "indulge every reasonable presumption against waiver," and cannot "presume acquiescence in the loss of fundamental rights." *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1938). In *Carnley* v. *Cochran,* 369 U.S. 506, 515 (1962), the Supreme Court expressly declared that "the principles declared in *Johnson* v. *Zerbst* [are] equally applicable to asserted waivers of the right to counsel in state criminal proceedings." More specifically, with respect to the right to counsel, the federal courts have consistently held that "The law requires 'an unequivocal request' to waive counsel by the defendant who wishes to act as his own lawyer." *Soto* v. *United States,* 369 F.Supp. 232, 236 (E.D. Pa. 1973), citing *United States* v. *Fay,* 364 F.2d 219 (2d Cir. 1966); *Meeks* v. *Craven,* 482 F.2d 465 (9th Cir. 1973).

The *Meeks* Court found no waiver of the right to counsel in spite of the following colloquy:

> The Court: You still want to represent yourself?
> The Defendant: Yes, Your Honor, I think I will.

The Court held that "Meeks' 'I think I will' is a prototype of equivocation." *Id.* at 467. The facts of the instant case establish that there was not present even that express equivocal waiver of counsel by petitioners who emphatically and frequently stated that they would not represent themselves.

The Appellate Division, in affirming petitioners' convictions, did not purport to find an *actual* express waiver of the right to counsel in the instant case. Rather, the Court concluded that petitioners' actions in discharging their counsel without good cause on the day preceding trial and then refusing to assert any defense were *equivalent* to an express waiver of counsel.

The United States Court of Appeals for the Fourth Circuit was presented with an almost analogous situation in *Patton* v. *State of North Carolina,* 315 F.2d 643 (4th Cir. 1963). There, a criminal defendant who dismissed his employed counsel on the day of trial after having been told that his trial would commence that day, with or without counsel, was held not to have waived his constitutional right to the assistance of counsel to defend charges of armed robbery.

The *Patton* Court citing *Johnson* v. *Zerbst, supra,* held that effective waiver of counsel cannot be implied and concluded that

> He [Patton] then attempted to procure the services of other counsel. This effort, which was made with full knowledge of the trial court, was unsuccessful but it served to emphasize Patton's desire for and realization of the need of the assistance of counsel. We conclude that Patton could not reasonably be held

> to have intelligently and understandingly waived a constitutional right which he, at the very moment of being put to trial, continued to assert.

Patton, at 646. The Court also found it significant in *Patton* that he had not previously sought any continuances. So in the instant case, the record reflects that neither petitioner had previously sought continuances of the trial date and the continuance eventually sought and refused was for a period of seven days.

> [U]nder such circumstances, the convenience of the court, the jury, the prosecutor or the witness for the prosecution should not be deemed a consideration of sufficient importance to override the preservation of the constitutional right of the accused.

Patton, at 646. *Accord, United States* v. *McMann*, 252 F.Supp. 539, 545 (N.D.N.Y. 1966). "Court or prosecution conveniences are to be of secondary consideration in the search for the overriding or waiver of this important right [to counsel]."

In *McMann*, a habeas corpus proceeding, the defendant discharged his attorney on the second day of trial after being informed that if he did so he would have to proceed alone. The trial court there also was convinced that it was a tactic employed for purposes of delay. The trial court, however, subsequently adjourned the trial from October 17, to October 22, to permit the defendant to retain other counsel. On the 22nd the defendant still had not been able to retain other counsel and the court offered him the services of a Legal Aid Society attorney with one hour to familiarize himself with the case. This offer the defendant expressly refused. The court adjourned again until October 24th at which time, in contradistinction to

the instant case, the defendant actively attempted to represent himself.

In finding no waiver of the right to counsel the *McMann* Court stated:

> It would add unnecessarily to this writing to particularize all the instances in the trial record which show this petitioner with a two or three-year high school education was inept and amateurish in defending himself in a court of law at a jury trial against a trained prosecutor.

Id., at 544.

> The right to counsel is basic and the right to choose one's own counsel is a vital element in that right. [citation omitted]. Court or prosecution conveniences are to be of secondary consideration in the search for the overriding or waiver of this important right. [citation omitted]. The balancing considerations, troublesome, as noted often, are that the right of counsel cannot be manipulated so as to interfere with the fair administration of justice, *but the defendant must have complete confidence in counsel and hence, a change, if it occurs, or even a discharge, will usually point to a continuance.*
>
> . . .
>
> Of course, the right to counsel cannot mean continual delay of discharging counsel and refusing to select a new lawyer to defend, but the desire for expedition can furnish no justification for the subversion of the Sixth Amendment to present an effective defense through counsel. [citation omitted].

Id., at 545. (Emphasis added).

Moreover, in affirming petitioners' convictions in the instant case it appears that the Appellate Division did so in no small part because "In view of the overwhelming proof of the guilt of the defendants apparent from this record, the convictions should not be overturned." It has long been established, however, that

> Justice Frankfurter explained our judicial policy now fully accepted in constitutional challenges of this kind. Determinations must be influenced by certitude of guilt or by the fact that the defendant is a bad man with a long criminal record.

McMann, at 546 citing cases.

United States v. *Fay*, 364 F.2d 219 (2d Cir. 1966); and *United States* v. *Curtiss*, 330 F.2d 278 (2d Cir. 1964), also lend strong support to petitioners' claim that they were denied their constitutional right to counsel.

Curtiss, holding that there was no waiver of the right to counsel by the Appellant there observed that:

> Curtiss' statements indicate that while he was unhappy about his relationship with [his attorney], he certainly had no wish to try the case himself but felt 'that he had no choice.'

Id., at 280. In *Curtiss*, the defendant had stated to the trial judge in chambers "But I have no choice. O.K., I will go along." *Id.* at 279. So in the instant case, when petitioners were informed that "We are going forward at this time with or without counsel," (T.T. 154-155), they responded "if that's the way it's got to be, that's the way it's got to be." (T.T. 155). Additionally, petitioners on numerous occasions emphatically indicated that they did not desire to, and would not, represent themselves.

As the *Fay* Court stated in finding no waiver of the right to counsel by a defendant who had discharged his attorney after the commencement of the trial:

> On the contrary, appellee continued to insist on hiring a [new] lawyer. He did not indicate any desire to proceed pro se; indeed, he insisted that he would not proceed alone.

United States v. *Fay*, 364 F.2d 219, 222 (2d Cir. 1966).

Finally, even if the Appellate Division was correct in its holding that the instant petitioners discharged their attorneys without good cause, then, and in that event, the trial court committed reversible error in permitting the attorneys to withdraw their appearances on the day before trial unless and until new counsel had entered his appearance. *Soto* v. *United States*, 369 F. Supp. 232 (E.D. Pa. 1973).

It is well recognized that a trial judge need not permit counsel to withdraw on the eve of a trial, because of the dissatisfaction of his client, in the absence of good cause shown. Indeed, to do so may be clear reversible error. The case of *Soto*, *supra*, is almost exactly on point.

In *Soto* the defendant, after conferring with other attorneys, became dissatisfied and attempted to discharge his two court-appointed attorneys on the day the case was called for trial. The trial judge refused to grant counsels' motions to withdraw until such time as other counsel was actually substituted:

> I am going to insist that [counsel] remain, that they will represent you to the best of their ability whether you like it or not.

Id. at 234. The defendant Soto subsequently appealed his conviction on the ground that he was not advised of his

right to proceed pro se. In affirming the conviction, the Court observed that:

> . . . the only fair inference which could be drawn was that Soto might be contemplating a *change* of counsel, not that he desired to dispense with counsel and represent himself. . . . The law requires 'an unequivocal request' to waive counsel by the defendant who wishes to act as his own lawyer. [Citations omitted]. On this record, *to have permitted* [counsel] *to withdraw and to have required, or permitted, Soto to go to trial without counsel would have constituted clear, reversible error. See, e.g. United States* v. *Fay, supra; United States* v. *Curtiss,* 330 F.2d 278 (2d Cir. 1964); *Meeks* v. *Craven, supra.*

369 F. Supp. at 236. So in the instant case, to have permitted petitioners' counsel to withdraw on the day before the trial when petitioners clearly did not wish to represent themselves and before any new counsel had entered his appearance was tantamount to *requiring* petitioners to go to trial without counsel and abrogated their Sixth Amendment right to counsel.

These conflicts between the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, and the federal decisions cited *supra,* justify the grant of certiorari to review the judgment below.

II. The Decision Below Raises an Important Question of Federal Constitutional Law as to the Proper Interpretation of the Sixth Amendment Right to Confrontation and Cross-Examination to Show Prejudice, Interest or Bias of Prosecution Witnesses.

On September 11, 1974, the record reflects that Attorney Alch, in open Court, stated as one of the grounds of his refusal to enter his appearance on that date and imme-

diately commence trial was that Judge Clyne had advised, akin to a pretrial ruling, that he would exclude all evidence of the alleged brutality inflicted upon petitioners by New York State Troopers at the time of their arrest and the obtaining of alleged confessions from them. Judge Clyne stated that said evidence raised a collateral issue and was irrelevant in view of the prosecution's voluntarily suppressing the alleged confessions. Judge Clyne ruled further that he would not permit the introduction of this evidence or the fact that petitioners had instituted a Civil Rights Action against eighteen New York Troopers in order to show prejudice, interest or bias of those officers, nine of whom did in fact testify at trial on behalf of the People.

In affirming petitioners' convictions the Appellate Division stated that the trial judge had merely expressed doubt as to the admissibility of such evidence in a chambers discussion and that the "tentative determination never became a subject of a formal ruling and cannot be raised on appeal."

The transcript of the September 11, 1975, hearing in open court, however, confirms the fact that the trial judge had previously ruled that he would not permit the introduction of such evidence. The "tentative determination" made by Judge Clyne was not as to whether he would permit the introduction of this evidence but whether, having excluded it, he would permit the introduction of a specific offer of proof which Mr. Alch explained he would feel compelled to make in order to protect the record.

> The Court: What authority is there in New York law for an offer of proof on the part of a defendant?
>
> • • •
>
> The Court: I see nothing in the Criminal Procedure Law permitting such offer.
>
> • • •

> The Court: (Continuing) If you would give me authority I will be bound by it.

(T. 11. 14-16).

If there was any doubt as to whether the trial judge deemed his ruling to have been a definitive ruling on the admissibility of the alleged brutality and the institution of the Civil Rights Action to show interest, bias or prejudice, it was dispelled the following day after the trial commenced. After the jury selection but prior to the commencement of evidence, petitioner Lutz stated to the Court as follows:

> If we had a lawyer who was adequately prepared, we would ask him to offer into evidence facts concerning brutality of the State Police against us on the issue of bias.

(T.T. 333). Judge Clyne immediately responded:

> All right, we went — just a minute — we went through that yesterday. Mr. Walch [sic Alch] made that statement on the record what he intended to show.

(T.T. 333).

In view of the foregoing it is respectfully submitted that the record was adequately protected, that this evidentiary issue had in fact been the subject of a definitive ruling and was properly raised on appeal.

The federal courts and indeed this very Court have long held that the constitutional right of a criminal accused to be confronted with witnesses against him is secured for all defendants in state as well as federal criminal proceedings. *Davis* v. *Alaska,* —— U.S. ——, 94 S. Ct. 1105 (1974); *Pointer* v. *Texas,* 380 U.S. 400 (1965). Inextricably

intertwined and integral to the right of confrontation, indeed, a primary interest secured by this right, is the right of cross-examination. *Davis* v. *Alaska, supra; Douglas* v. *Alabama,* 380 U.S. 415, 418 (1965).

As this Honorable Court stated in *Davis* v. *Alaska*:

> A more particular attack on the witness' credibility is effected by means of cross-examination directed to revealing possible biases, prejudices or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony. [citation omitted]. We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.

—— U.S. ——, 94 S. Ct. at 1110. Further, where effective and relevant cross-examination is denied it is "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." 94 S. Ct. at 1111 citing *Brookhart* v. *Janis*, 384 U.S. 1, 3; *Smith* v. *Illinois,* 390 U.S. 129, 131 (1968).

In the instant case, it can hardly be seriously controverted that evidence of vicious beatings inflicted upon petitioners by those arresting officers who were prosecution witnesses, and evidence that petitioners had instituted a civil action against them, was directly relevant to the possible interest, bias or prejudice of those witnesses.

In addition, petitioners contend that they should have been able to call as witnesses those State Troopers who were named as civil defendants by petitioners but who were not called as witnesses for the prosecution in order

to enable petitioners to demonstrate the interest, bias and prejudice of the prosecution's testimonial evidence. *United States* v. *Haggett,* 438 F.2d 396 (2d Cir. 1971).

> . . . 'bias or interest of a witness is not a collateral issue, and . . . extrinsic evidence is admissible thereon.'

Id. at 399 quoting *United States* v. *Battaglia,* 394 F.2d 304, 314, n. 7 (7th Cir. 1968). Indeed, even the New York State courts generally recognize that while a trial judge may in his discretion limit the *extent* to which he will permit independent evidence to show hostility, he may not as in the instant case exclude all such evidence for that purpose. *People* v. *McDowell,* 210 N.Y.S. 2d 514, 9 N.Y.2d 12 (1961).

In *Villaroman* v. *United States,* 184 F.2d 261 (D.C. Cir. 1950) the Court reversed a defendant's conviction for assault with a dangerous weapon when the trial court had refused to permit the defendant to cross-examine the complaining witness about a pending civil suit which the complainant had filed against him seeking $50,000 in damages for personal injuries.

> The court refused to allow any reference to the suit by cross-examination or otherwise, upon the theory that it was irrelevant. This, we think, was prejudicial and reversible error. Bias of a witness is always relevant.

Id. at 262, citing numerous cases.

> 'A wide range of cross-examination should be allowed to show the *motive, interest,* or animus of a witness.'

Id. citing numerous cases.

In the instant case, although the petitioners did not defend themselves and conducted no cross-examination, it is clear that they desired counsel to cross-examine prosecution witnesses on this critical area of interest, motive or bias. It is equally clear that the judge had ruled on the admissibility of such evidence and not only was there to be no wide-range of cross-examination permitted, *Villaroman, supra,* but the scope of permissible cross-examination on this issue was non-existent.

Conclusion

For the foregoing reasons and upon the authorities above cited, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department.

Respectfully submitted,

GERALD ALCH, ESQUIRE
One Center Plaza
Boston, Massachusetts 02108
Attorney for Petitioners

August 12, 1975

APPENDIX

SUPREME COURT — APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

#24103
#24103-A

THE PEOPLE OF THE STATE OF NEW YORK,
RESPONDENT,
v.
ROBERT J. DE CHIARO et al.,
APPELLANTS.

DECISION
May 8, 1975.

Judgments affirmed.

Opinion per LARKIN, J.

HERLIHY, P. J., GREENBLOTT, MAIN *and* REYNOLDS, JJ., concur.

STATE OF NEW YORK
SUPREME COURT — APPELLATE DIVISION
THIRD DEPARTMENT

#24103
#24103-A

THE PEOPLE OF THE STATE OF NEW YORK,
RESPONDENT,
– against –
ROBERT J. DE CHIARO et al.,
APPELLANTS.

Argued, March 6, 1975.
Before:
HON. J. CLARENCE HERLIHY,
Presiding Justice,
HON. LOUIS M. GREENBLOTT,
HON. ROBERT G. MAIN,
HON. JOHN L. LARKIN,
HON. WALTER B. REYNOLDS,
Associate Justices.

APPEAL from judgments of the County Court of Rensselaer County (John J. Clyne, J.), rendered September 30, 1974, upon a verdict convicting defendants of the crimes of burglary in the first degree and attempted robbery in the first degree.

KOHN, BOOKSTEIN & KARP (Gerald Alch, One Center Plaza, Boston, Massachusetts admitted pro hac vice, for appellants, 100 State Street, Albany, New York 12207.

DONALD J. SHANLEY, Special Prosecutor, for respondent, 35 First Street, Troy, New York 12180.

OPINION FOR AFFIRMANCE

#24103
#24103-A

LARKIN, J.

The testimony in this case is that the State Police, acting on intelligence that there would be a robbery or burglary at a hotel in Rensselaer County, staked out the premises. On the night of January 27, 1973 defendants, one of whom was armed, appeared at the hotel and entered through a window. They were caught inside the beams of police flashlights and recognized from pictures previously given to the police. Gunfire followed their refusal to heed State Police commands and the defendants escaped, only to be tracked through deep snow and captured a few hours later.

Defendants were indicted for the crimes of burglary in the first degree and attempted robbery in the first degree.

Shortly after their arrest, defendant Lutz retained attorney E. Stewart Jones, Jr., and defendant DeChiaro retained attorney Thomas J. O'Connor, both of whom represented the defendants from February, 1973 until September, 1974. The conduct of the defense included participation in a preliminary hearing and motions for discovery and inspection, bills of particulars, suppression of identification testimony and suppression of alleged confessions. The attorneys further moved for dismissal of the indictment on the ground of selective prosecution, moved in this court for a change of venue, engaged in plea-bargaining and finally participated in the identification hearing on the eve of trial.

During mid-August, 1974 defense counsel and the special prosecutor were advised by the Trial Judge that this case would be the first one reached at the September, 1974 Trial Term. The identification hearing, which was to be followed by the trial, commenced on September 9, 1974 and at its continuation on the morning of September 10, 1974 defend-

ants discharged their respective counsel and announced their retention of a new firm. The sole reason given by defendant Lutz was an alleged conflict of interest because Mr. Jones had, since March, 1974, served as a special prosecutor in Rensselaer County. Defendant DeChiaro implied a conflict on the part of Mr. O'Connor because of his association with Mr. Jones. A motion for a continuance was denied.

The identification hearing concluded without further representation of the defendants as they would not proceed with their former attorneys. Upon the new attorney's appearance late the next afternoon the court directed that a notice of appearance be filed and a jury selected the following day, with the trial to commence on the following Monday, several days hence. On the new attorney's refusal to appear under such terms, the court advised the defendants to reconsider and go to trial with the original attorneys. Defendants refused and the court appointed the original attorneys. Both they and the defendants objected to the appointments and ultimately the court advised the defendants that they were now without attorneys. Prior to the commencement of the trial, the defendants elected to proceed without counsel although during the voir dire they attempted to change their position. The trial commenced the next morning without defense counsel and the defendants, not participating in the trial, were convicted of the crimes for which they were indicted.

Defendants urge that the denial of their absolute right to counsel of their own choosing mandates reversal. We recognize that a defendant possesses the right to defend in person or by counsel of his own choosing (N.Y. Const., art. I, § 60; *People* v. *McIntyre,* 36 N.Y. 2d 10; *People* v. *McLaughlin,* 291 N.Y. 480).

A defendant has a right to counsel of his own choosing and, thus, the corollary right to change counsel at any

moment from the time of retention of counsel up to and including the course of trial, for good cause. A defendant's right to counsel of his own choosing includes the right to change counsel at any time, without good cause, for any reason, or for no reason, if such change of counsel does not unreasonably interfere with the orderly course of the trial.

The record herein does not support the discharge of the attorneys for good cause. It appears that Mr. Jones, who had been retained by defendant Lutz shortly after his arrest in January, 1973 had appeared at a later date as a special prosecutor for Rensselaer County in an unrelated case and had completed his duties in that capacity some time prior to the date of trial herein. He had, of course, continually represented defendant Lutz from the date of his retention up to the point of discharge as herein related. There is nothing in this record that would indicate prejudice or conflict of interest on the part of Mr. Jones because he was a special prosecutor at an earlier date in an unrelated case. There was no claim that the defendants were not represented by competent, able counsel. The record speaks otherwise.

The last minute attempt by defendants to obtain other counsel was an effort to unreasonably interfere with the orderly course of the trial. The constitutional guarantees of counsel of defendant's own choosing and a reasonable time to prepare for trial with that counsel's assistance cannot be invoked to delay the course of justice (*People* v. *Brabson,* 9 N.Y. 2d 173; *People* v. *McLaughlin, supra*; *People* v. *Mooney,* 18 A.D. 2d 1112). In the instant case, in requesting a seven-day adjournment as a condition for his appearance, the new counsel stated that being ready for trial is a subjective matter of conscience and that he could not appear until he felt personally ready to proceed. It is patent that a defendant's attorney cannot arbitrarily determine the date of trial, especially, as in this case, with

the defendants out on bail, for the control of criminal calendars in this State rests with the judiciary.

The right to counsel does not include the right to delay (*People* v. *Reynolds,* 39 A.D. 2d 812). Under the facts in this case, the court's directions to the new attorney were reasonable. Defendants' decisions to forego any representation or to assert any defense in the trial were equivalent to an express waiver of counsel (*People* v. *Higgins,* 23 A.D. 2d 504). To overturn a verdict solely because the defendants elected to proceed without counsel could result in playing into the hands of experienced and wily defendants who refuse counsel in order to lay the foundation for a mistrial or a later attack on the conviction (*Sanchez* v. *United States,* 311 F.2d 327, *cert. den.* 373 U.S. 949).

The further contention advanced by defendants is that the trial court erred by refusing to admit, on the issue of bias, evidence of alleged brutality to the defendants by New York State Troopers. Defendants never attempted to offer such evidence. They rely on the fact that when such testimony was discussed in chambers, the Trial Judge expressed doubt as to its admissibility. Suffice to say that this tentative determination never became a subject of a formal ruling and cannot be raised upon appeal. In view of the overwhelming proof of the guilt of the defendants apparent from this record, the convictions should not be overturned (*People* v. *Brosnan,* 32 N.Y. 2d 254; CPL 470.05).

The judgments should be affirmed.

STATE OF NEW YORK
COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK,
RESPONDENT,
– against –
ROBERT J. DE CHIARO and ROBERT G. LUTZ
APPELLANTS.

Before: HON. HUGH R. JONES, *Associate Judge*

CERTIFICATE DENYING LEAVE

I, HUGH R. JONES, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Utica, New York, May 16, 1975

(s) HUGH R. JONES
Associate Judge

* Description of Order: Order of Appellate Division, Third Department, entered May 12, 1975, affirming a judgment of County Court, Rensselaer County, rendered September 30, 1974 [conviction of burglary first degree, and attempted robbery first degree].

LIBRARY
SUPREME COURT, U. S.

75-233

Supreme Court, U. S.
FILED
SEP 11 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975.

No. 75.

ROBERT J. DeCHIARO and ROBERT G. LUTZ,
Petitioners,

v.

THE STATE OF NEW YORK,
Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari.

DONALD J. SHANLEY,
Special Prosecutor,
Rensselaer County, New York,
35 First Street,
Troy, N. Y. 12180

Table of Contents.

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statement of the Case	3
Argument	18
Conclusion	27

TABLE OF CASES.

Arellanes v. United States, 302 F. 2d 603 (9th Cir. 1962)	23
Arellanes v. United States, 326 F. 2d 560 (9th Cir. 1964)	23
Avery v. State of Alabama, 308 U. S. 444, 60 S. Ct. 321, 84 L. Ed. 377	25
Brown v. United States, 264 F. 2d 363 (D. C. Cir. 1959), cert. den. 360 U. S. 911, 79 S. Ct. 1299	25
Cleveland v. United States, 322 F. 2d 401, 402-403, cert. den. 375 U. S. 884, 84 S. Ct. 841, 11 L. Ed. 2d 114 (1963)	25
Glenn v. United States, 303 F. 2d 536, 540-541 (5th Cir. 1962)	23

Page

Johnson v. United States, 291 F. 2d 150 (8th Cir. 1961) 25

Johnson v. United States, 318 F. 2d 855 (8th Cir. 1963) 25

Leino v. United States, 338 F. 2d 154 (10th Cir. 1964) 23

Neufield v. United States, 118 F. 2d 375 (D. C. Cir. 1941), cert. den. Rubin v. United States, 315 U. S. 798, 62 S. Ct. 580, 86 L. Ed. 1199 24

Patton v. State of North Carolina, 315 F. 2d 643 (4th Cir. 1963) 25

People v. Davis, 21 A. D. 2d 375 (N. Y.), lv. to app. den. 27

People v. Higgins, 23 A. D. 2d 504 (N. Y.), aff'd 16 N. Y. 2d 751 27

People v. O'Neill, 179 P. 2d 10, 78 Cal. App. 2d 888, cert. den. O'Neil v. State of California, 333 U. S. 858, 68 S. Ct. 728, 333 U. S. 858, 92 L. Ed. 27

People v. Reynolds, 39 A. D. 2d 812 (N. Y.) 27

Sanchez v. United States, 311 F. 2d 327 (9th Cir. 1962), cert. den. 373 U. S. 949, 83 S. Ct. 1678 27

Smith v. United States, 353 F. 2d 838 (D. C. Cir. 1965) 24

Swope v. McDonald, 173 F. 2d 852 (9th Cir. 1949), cert. den. 337 U. S. 960, 69 S. Ct. 1522, 93 L. Ed. 1759 24

Page

United States v. Abbamonte, 348 F. 2d 700 (2nd Cir. 1965) 24

United States v. Arden, 252 F. 2d 491 (2nd Cir. 1958) 23

United States v. Bando, 244 F. 2d 833, 845-846 (2nd Cir. 1957), cert. den. 355 U. S. 844, 78 S. Ct. 67, 2 L. Ed. 2d 53 26

United States v. Bentvena, 319 F. 2d 916, 936 (2d Cir. 1963), cert. den. *sub nom.* Ormento v. United States 375 U. S. 940, 84 S. Ct. 345, 11 L. Ed. 2d 271 23

United States v. Cozzi, 354 F. 2d 637 (7th Cir. 1966) 23

United States v. Fay, 348 F. 2d 705 (2nd Cir. 1965) 24

United States v. McMann, 252 F. Supp. 539 (N. D. N. Y.) 25, 26

Ungar v. Sarafite, 376 U. S. 575, 84 S. Ct. 841, 11 L. Ed 2d 921 (1964) 25

United States v. Sperling 506 F. 2d 1323 (D.C. Cir. 1974) 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75

ROBERT J. DECHIARO and ROBERT G. LUTZ,

Petitioners,

v.

THE STATE OF NEW YORK,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari.

The respondent, The People of The State of New York, by Donald J. Shanley, Special Prosecutor for Rensselaer County, makes and serves the following as and for its brief in opposition to the petition for a writ of certiorari made by the petitioners above-named for the purpose of reviewing their convictions for the crimes of burglary in the first degree and attempted robbery in the first degree.

Opinion Below.

The opinion of the Appellate Division of the Supreme Court, Third Judicial Department, was rendered on May 8, 1975, and is set forth in full at pages 32-36 of the appendix to the petition. The opinion is not yet officially reported, to the knowledge of respondent. The petitioners were denied permission to appeal to the Court of Appeals by an order dated May 16, 1975. No opinion was rendered in connection with such denial.

Jurisdiction.

Respondent does not question the jurisdiction as set forth in the petition.

Questions Presented.

Respondent feels that petitioners have not adequately set forth the true and complete nature of the legal issues presented to the Court upon this application and would restate the questions presented to the Court as follows:

1. May petitioners be heard to complain that their Sixth Amendment constitutional right to the assistance of counsel has been infringed upon when:

(a) They knowingly and voluntarily discharged their competent and fully prepared attorneys after the commencement of their trial without any sufficient reason or justification therefor; and

(b) They thereafter attempted to hire another attorney who, when offered a continuance for the purpose of preparing himself, deemed such continuance inadequate for his purposes and refused to enter the case; and

(c) They thereafter refused to accept as court-appointed counsel the same competent and fully prepared attorneys they had groundlessly discharged; and

(d) They would not even accept the assistance of such attorneys during the trial, stating that, if they could not have the attorney referred to in paragraph (b) above, they would not have any attorney; and

(e) They thereafter refused to participate in the trial but sat mute during the entire course thereof.

2. May the opinion of the trial judge as to the admissibility of evidence given during the course of an off-the-record conference had in chambers between the judge and the attorneys be raised to the level of a reviewable trial ruling merely because the opinion was later alluded to in the Courtroom?

3. May petitioners be deemed to have preserved any issues for appellate review when they refused to participate in the trial, but instead sat mute?

Constitutional Provisions Involved.

The constitutional provisions involved are as stated in the petition.

Statement of the Case.

Respondent does not accept the statement of the case as presented by petitioners as being complete and accurate. Moreover, at pages 11, 13, and 14 of the petition, petitioners have repeatedly referred to various conversations which are not in the record and, therefore cannot and should not be included in the statement of the case and, further, should not be considered by this Court. Accordingly, respondent has prepared and set forth below its own statement of the case which, it submits, more fully and clearly reflects what transpired below. All page references are to the record of appeal in the Court below.

On January 28, 1973, at approximately 10:30 P.M., four men approached the Crooked Lake Hotel located on Crooked Lake in the Town of Sand Lake, Rensselaer County, New York (trial transcript, pp. 339, 426). The

New York State Police had previously been warned that there would be a robbery attempted during that weekend and police officers were secreted throughout the building on the evenings of January 26, 27 and 28, 1973, hoping to apprehend the perpetrators (400-410).

While two men waited outside, the other men (later identified as the petitioners Lutz and DeChiaro) removed a pane of glass from a storm window and entered the basement area of the hotel (435). Previous to the actual break-in, three State Police Investigators, Judkins, Lukacovic and Daucher who were hidden in a room adjacent to the area where the break occurred saw both petitioners come to the windows and look inside and make further investigations of the area before entering (426-433, 452-453, 470-474). These same Investigators additionally testified that on the previous evening, January 27, 1973, they had been "staked out" in the same location and the same two men (petitioners) had come to the same windows and "cased" the area and the building (96-99). Investigator Judkins testified that prior to their entering the building on January 28, 1973, the petitioner DeChiaro had a pistol in his right hand (431, 432).

Once inside the building in an area used during the summer as a snack bar, petitioners entered the main area of the basement through a door. Investigators Daucher and Lukacovic, each armed with shotguns and equipped with flashlights, were behind this door in a hallway (454-457, 472-474). As petitioner entered, Investigators Daucher and Lukacovic retracted and then turned on their flashlights. Both clearly identified petitioners as the men who appeared in the beams of their flashlight (456, 475, 476). Investigator Lukacovic stated that he was personally acquainted with both petitioners, having previously seen them on the street on many occasions (468, 469).

Petitioners were taken by surprise when the flashlights were ignited. Both Investigators, Daucher and Lukacovic, stated that petitioner DeChiaro swung toward them with the pistol in his hand and, at that juncture, both Investigators fired their shotguns (459, 478).

Neither petitioner was struck by the shots and both fled the building (478). As they emerged Investigator Robert Stapleton came out onto an upper porch, observed that the subjects were armed and fired another shotgun blast at them, but again petitioners remained unscathed (523) and succeeded in fleeing into the woods nearby (383-386).

The State Police immediately organized a search party and petitioners' tracks were followed through the snow for some miles (481-569). Finally, early next morning the petitioners were found hiding in a tree in heavy woods some few miles from the scene of the crime (530-532).

Petitioners were indicted for burglary in the first degree and attempted robbery in the first degree. The allegation of each count was that, during the commission of each crime charged, one or more of said petitioners displayed what appeared to be a pistol, revolver or other firearm.

Within a short time of their arrest the petitioners retained counsel to represent them on these charges. Petitioner DeChiaro retained attorney Thomas J. O'Connor, Jr., of Troy, New York, and petitioner Lutz retained attorney E. Stewart Jones, Jr., also of Troy, New York. Both attorneys immediately procured an order directing the District Attorney to show cause why a preliminary hearing should not be held and on February 13, 1973, argument was had upon such application (1-14). Following such argument, the late Hon. Matthew M. Dunne, Acting Rensselaer County Judge, granted petitioners' ap-

plication and directed that a preliminary hearing be held before the Justices' Court of the Town of Nassau (15, 16). This preliminary hearing was held and both Mr. Jones and Mr. O'Connor appeared and participated in such hearing. Both petitioners were held for action by the grand jury.

Following their indictment, petitioners were arraigned in the Rensselaer County Court on May 29, 1973 (25-28). Attorneys Jones and O'Connor continued their representation of petitioners.

Thereafter, these attorneys made the following motions on behalf of the petitioners:

1. Each attorney moved to suppress written confessions allegedly made by each petitioner concerning their participation in this crime upon the grounds that each confession had been coerced. As a result of these motions, the People agreed that neither confession would be used upon the trial and so no formal order of suppression was made (30-34).

2. Each attorney moved to dismiss the indictment upon the grounds of selective enforcement of the provisions of the Penal Law by the People—the argument being that petitioners had been indicted for the burglary and attempted robbery but the State Police had not been indicted for assaulting petitioners. This novel and imaginative motion was denied (39-42).

3. Each attorney moved to dismiss the indictment in the interests of justice, again because of an alleged deprivation of their constitutional rights following their arrest and this also was denied (42-43).

4. Each attorney moved to suppress prospective trial identification of the petitioner as perpetrators of these crimes upon the grounds that prior to their "stakeout" the State Police officers had examined "mug shots" of the petitioners and that this was so suggestive as to taint their later view of the petitioners at the scene of the crime (43-45). A hearing was directed on this issue.

5. Each attorney moved on behalf of petitioners for an order permitting a discovery and inspection of many items of physical evidence, reports, analysis and even all "exculpatory evidence." This motion was largely granted but denied in part.

6. Each attorney also sought and obtained bills of particulars of the indictments.

The argument of these motions was had on June 18, 1974, a year and one month or so after the arraignment of petitioners. The delay was occasioned by the following set of unusual circumstances: the Rensselaer County Judge Timothy J. Fogarty died; the District Attorney was appointed County Judge; the Public Defender of Rensselaer County, whose office had represented one of the other men allegedly involved in this crime, was appointed to be District Attorney and, finally, Acting Rensselaer County Judge (and Surrogate) Matthew M. Dunne also died. The result of this unusual sequence of events was that (a.) a Special County Judge had to be assigned from outside the County and (b.) a Special Prosecutor had to be found, selected and appointed.

During all of this one year lapse of time, both petitioners continued to be represented by attorneys Jones and O'Connor. No "speedy trial" motion was ever made and, except as a matter of interest, the lapse of one year is without further legal significance.

During the summer of 1974 petitioners' discovery motion was decided, formalized and implemented. The Special Prosecutor in the middle of August, 1974, took petitioners' attorneys to the State Police Troop G Headquarters in Loudonville, New York, and permitted a visual inspection of all items of physical evidence. Defense attorney O'Connor, acting for himself and attorney Jones was permitted to see every photograph and order copies of those which he wanted. Copies of all scientific and ballistic reports and analyses were provided. Defense counsel announced their satisfaction with the discovery and inspection. One test remained to be performed. Police had recovered ski masks near the scene of the crime which contained hairs. By court order the People were permitted to obtain samples of petitioners' hairs for comparison analysis, subject, however, to the right of petitioners' expert to be present when the analysis was made.

In the middle of August, 1974 (or thereabout), both defense counsel and the Special Prosecutor were advised by Hon. John J. Clyne, Albany County Judge, that he had been assigned to preside at the trial of these petitioners at the September 1974 trial term of the Rensselaer County Court and that this case was to be the first one reached. All attorneys were acquainted with the fact that Judge Clyne's assignment was to end on or about September 19, 1974, and all attorneys were sternly admonished to be ready to proceed to trial at the time indicated. This admonition was discussed by all counsel on several occasions during that August and certainly there was no misunderstanding as to what was to occur and when. The Special Prosecutor began feverish trial preparations and was aware that his adversaries were not idle on their side.

On September 6, 1974, both defense counsel and the Special Prosecutor participated in earnest and protracted plea bargaining, which proved not fruitful. In the interim, legal proceedings had gone forward as a result of conferences between counsel and Judge Clyne. Certain decisions were reached. Firstly, the People had agreed that they would not under any circumstances, even for impeachment, make use of either written confession made by the petitioners. This wholly obviated any need for a suppression hearing in that respect. Secondly, the court had agreed, over the People's strenuous objections, that petitioners were entitled to a hearing upon the issue of identification testimony. The hearing was to commence on the following Monday, September 9, 1974, to be followed immediately by the actual trial.

On the issue of the hair comparison analysis, it was discovered, when reasons for the delay were investigated, that petitioners' expert had failed to notify the State Police Laboratory when he would be available for the tests and this had prevented the occurrence of the test. Final arrangements for the tests were made. Attorneys for petitioners did not protest their unreadiness.

On Friday evening, September 6, 1974, attorney Jones telephoned the Special Prosecutor and advised him that he would seek, on September 7, 1974, an order from Mr. Justice Michael E. Sweeney of the Appellate Division of the Supreme Court directing the Special Prosecutor to show cause why a change of venue should not be had because of alleged prejudicial pretrial newspaper publicity. On September 7, 1974, attorney Jones and the Special Prosecutor journeyed to the home of Justice Sweeney in Saratoga Springs, New York, for argument of the order to show cause. Justice Sweeney signed the order and the matter was scheduled for argument before this court on September 9, 1974.

In the interim, Judge Clyne directed that the identification hearing go forward as scheduled on September 9, 1974. On this date, the hearing commenced (53). Attorneys Jones and O'Connor appeared for petitioners and participated in the hearing throughout that day (53-193). Defense counsel cross examined the People's witnesses, made necessary objections and fully protected the rights of their clients.

During luncheon recess on September 9, 1974, attorneys Jones and O'Connor and the Special Prosecutor appeared before the Appellate Division of the Supreme Court at Albany, New York, and made oral arguments on petitioners' application for a change of venue. By 4:30 that afternoon, that court had made its decision denying petitioners' motion in its entirety.

The next morning, September 10, 1974, the Rensselaer County Court reconvened for the purpose of continuing the identification hearing (194). It was understood that on the day following, September 11, 1974, jury selection would commence in the trial-in-chief. On September 10, as the Special Prosecutor was about to swear his first witness of the day, Mr. Jones suddenly arose and loosed a bombshell. He announced that he had been advised by petitioner Lutz about "five minutes ago" that he had been discharged as his attorney (195). Mr. Jones further announced that he had been advised by Mr. Lutz that on the previous evening both petitioners had retained "the firm of F. Lee Bailey to defend them on these charges" (195). Mr. Jones further advised the court that Mr. Bailey would be in court "tomorrow morning for the purpose of defending Mr. Lutz and Mr. DeChiaro" (196). The court pointed out that a jury was to be selected the following day (196). Mr. Jones asked for a continuance. The court denied the motion "in the exercise of discretion" and directed that the hearing continue (196). Mr. Jones protested that he had been discharged.

At this point, the trial justice gave to the petitioners a clear choice. They would proceed with Mr. Jones and Mr. O'Connor for the purpose of completing the hearing or represent themselves at the hearing (197, 198). The court recessed to allow petitioners to make a decision.

During the recess, the trial justice contacted the firm of F. Lee Bailey and later stated on the record that it was the court's understanding that a member of that firm would be in court the following morning prepared to commence the selection of a jury. The trial justice strongly recommended that petitioners' present attorneys remain in the case for the balance of that day so that there would be an orderly transition of the files to the newly retained counsel "* * * because in no event will the trial of this case be further delayed" (199).

In response, Mr. Jones, the attorney for petitioner Lutz, stated that Lutz would "stand on his position" that because of the retention of Gerald Alch of "Mr. Bailey's firm," he (Jones) was "no longer" Lutz's attorney and that "* * * he (Lutz) did *not* want me (Jones) to proceed with this hearing on his behalf * * *" (200). The court responded that the newly retained attorney was not present and that "* * * the only attorney that is here that could aid and assist the defendant is yourself" (200). The court further stated that "* * * the choice is the defendants but the hearing will continue to it's conclusion and the selection of the jury will commence tomorrow morning * * *" (200, 201). At this point attorney O'Connor stated that he had been "similarly advised by his client" (petitioner DeChiaro).

Petitioner Lutz asked and received permission to address the court. He stated that he had "* * * come to the conclusion * * *" that because Mr. Jones was a "special prosecutor * * * there is a confliction of in-

terests" (201). The court responded that Mr. Jones was the Special Prosecutor in June (actually since March of 1974) and questioned whether it could have taken that length of time to make such a determination (201). Petitioner Lutz stated that Jones was not the lawyer of his choice. Petitioner DeChiaro then announced that "the association between Mr. O'Connor and Mr. Stewart Jones is the same" (202), implying that there was also a conflict of interest as far as attorney O'Connor was concerned (202).

The colloquy between the court and petitioners continued. The court stated that he regarded this attempt to change attorneys as a ploy to attempt to delay the trial, since Mr. Jones had been appointed Special Prosecutor in March of 1974, and now on the eve of trial the petitioners were attempting to raise the issue of conflict of interest (203, 204). Petitioner Lutz was adamant, stating "* * * I don't want him for my attorney. That's all I have to say." And then added "Today either" (205). The court said that the hearing would go forward "at this time with or without counsel" (205, 206). DeChiaro stated that if "* * * that's the way it's got to be, that's the way it's got to be" (206). Both petitioners then stated that Jones and O'Connor would not represent them at the hearing and the hearing proceeded with both petitioners representing themselves (206-245).

At the close of the suppression hearing, the court stated that it had talked by telephone again to the Bailey law firm and had again advised that firm that the jury selection was to begin at 9:30 a.m. the next day and that Mr. Bailey had advised the court that "his partner would be present in Court at that time" (246).

It should here be noted that during the course of the uproar over the discharge of petitioners' prior attorneys,

the People had made available to petitioners a copy of the report of the hair comparison analysis. It is thus untrue to say that the People had failed to comply with the discovery order. Petitioners' expert delayed the tests, but the results were made available to both petitioners prior to trial. And in any event, the tests were negative.

The following morning, September 11, 1974, petitioners appeared in court without counsel and said that Mr. Alch was fogbound at Logan Airport in Boston (769). The court attempted to pin down petitioner Lutz as to whether or not Mr. Alch did represent him, but Lutz was evasive (770). The court did confirm that he had spoken to Mr. Alch and he would be present later that day. At this point the court released the jury until the following day—in effect granting an adjournment to the petitioners (770, 771). The court stood in recess to await the arrival of Mr. Alch.

At 5:40 p.m. on September 11, 1974, court reconvened. Mr. Alch was present in the courtroom. Petitioners both announced that they were still unrepresented by counsel. Mr. Alch then spread upon the minutes a lengthy statement (774-788). He stated that he had discussed the matter with the court in chambers and requested a continuance of seven calendar days to prepare for trial (776). One of the reasons for such a delay, he stated, was that he had to gather evidence (had not this already been done?) of police brutality (777, 778). The court stated that, since no confession was to be used, he saw no relevancy of such evidence (779, 780).

Mr. Alch then admitted that the court had consented to postpone the opening of proof until the following Monday, so long as a jury was selected the following day (Thursday). Mr. Alch stated that "* * * it is quite possible for me to go to trial on Monday * * *" but that *he*

would not deem this sufficient time and so would not enter an appearance on behalf of petitioners (781).

The court then stated that there was a difference of opinion between Mr. Alch and the court as to what constituted a reasonable time to prepare. The court noted that attorney Alch would have three calendar days to prepare (four if Thursday was counted) and further noted that Mr. Alch had with him a trial assistant, Mr. Daly, to assist in selecting a jury and trial preparation. The court stated that the issues in the case were such that in its opinion, considering the other factors, Mr. Alch could be ready four days hence (782-784). The court went on to note that the petitioners on the eve of trial made the choice to discharge their "competent, adequate counsel" (786). The court asked Mr. Alch to undertake the representation of the petitioners but he would not do so (787, 788).

The court then stated to petitioners, who had been present in court throughout the colloquy with Mr. Alch, that they appeared to be without counsel and advised them to reconsider their discharge of Jones and O'Connor (who were then also physically present in the courtroom). The court then pointed out that Jones and O'Connor were "* * * able, competent counsel, who are very familiar with this case and * * * prepared to move forward and defend this matter on your behalf" (789).

Petitioner Lutz stated that he had discharged "my lawyer" and petitioner DeChiaro agreed. The court then made the following direction:

> "Under the circumstances I am appointing Mr. Jones to aid and assist Mr. Lutz during the trial of this case. The degree of cooperation will depend upon the defendant's own choice. I am also designating Mr. O'Connor to aid and assist Mr. DeChiaro

> in the trial of this case and the degree of the cooperation will depend on the defendant's own actions" (791).

Jones protested the appointment (792). The court then turned to petitioner Lutz and asked him if he objected. Lutz stated: "I strongly object." The court asked the same question of petitioner DeChiaro, who replied "I do object." The court then stated to petitioners that they were "* * * on their own" and directed them to be present the following day to begin jury selection (792).

The following day, September 12, 1974, court reconvened for the selection of a jury. Petitioners were present. The court asked DeChiaro if he was represented by counsel. DeChiaro responded: "I will not proceed with an attorney" (280). The court then asked Lutz the same question and Lutz replied: "Ready to proceed without an attorney" (280, 281).

Petitioner Lutz then proceeded to make a legally sophisticated motion to disqualify the trial justice which was denied (281, 282). The court again pointed out that their posture of appearing before the court without attorneys was the result of their "* * * own free will and voluntary acts * * *" (282).

Jury selection then proceeded and was completed that same day. One of the jurors stated that she was the first cousin of Mr. O'Connor's *law partner* (290) but stated that she had never discussed the case with her cousin and her relationship would not influence her decision in any way (290, 291). She was acceptable to the People and was seated. Petitioners, when asked if they wished to examine and challenge any jurors stated that they did not wish to participate in the trial "in any way" (299).

When the jury selection was completed, the court fully instructed them in their duties (313-317) and the People opened (317). The court then took a brief recess and when the court reconvened the court again spoke to the petitioners concerning their right to counsel. The court "strongly recommended" that petitioners either obtain counsel of their choosing or "permit the court to assign counsel to assist them throughout this trial" (326). Both petitioners, when asked the direct question whether they wished the court to appoint counsel, fenced with the court and continued to assert that they wanted Mr. Alch, but both made it crystal clear that they would not accept assigned counsel (326-336). Quite clearly petitioners wished to leave themselves in their present posture of being without counsel and gamble all upon an appellate finding that they had been deprived of their right to counsel.

The trial commenced on September 12, 1974, with the petitioners unrepresented by counsel. The People called 13 witnesses and introduced some 61 exhibits into evidence. In summary, the witnesses testified that the police had received a tip that the Crooked Lake Hotel was to be "hit" on the weekend of January 26, 1973. They "staked out" the premises. On the evening of January 27, 1973, the officers concealed in the building saw both petitioners come to the window, examine the premises and then leave. The following evening petitioners, accompanied by two other men, returned. Petitioners entered while the other two remained outside. Both petitioners were identified in the courtroom by three police officers as the two that entered. These same three officers stated that DeChiaro displayed a pistol. When fired upon, petitioners fled. They were tracked through the snow and captured in the woods several miles from the Crooked Lake Hotel. Petitioner Lutz was found under a tree and petitioner DeChiaro was apprehended hiding in a tree.

Following the presentation of the People's case, the court on September 13, 1974, adjourned for the weekend (667). Petitioners were advised that they could put in their proof, if they so desired, on Monday, September 16, 1974. On that day, both petitioners requested a mistrial upon the grounds that they did not have an attorney who was properly prepared (674), which motion was denied. Petitioners then declined to present evidence on their own behalf, stating that they "* * * were not now nor never had been defending * * *" themselves (676). The proof was declared closed and, following a summation by the People (petitioners declined), the case was submitted to the jury. Their verdict was one of guilty on both counts of the indictment (751). Both petitioners immediately applied for bail pending appeal (again, a sophisticated request), but this was denied (754, 755) and the petitioners remanded.

That very same day, within a short time after the guilty verdicts, Mr. Alch's associate was on the telephone to the office of the Special Prosecutor concerning bail pending appeal. The following day, Mr. Alch and Mr. Daly did in fact come to this court and did obtain the release of petitioners on bail pending the determination of their appeal.

Petitioners were sentenced on September 30, 1974. Both petitioners stated that they then had an attorney but that he was "in Boston." They stated that they did not wish to be represented by counsel at the time of sentencing (758). Each petitioner was sentenced to an indeterminate term of 25 years maximum on the burglary conviction and to an indeterminate term of 15 years maximum on the attempted robbery conviction, both sentences to run concurrently (760-764).

Petitioners appealed their convictions to the Appellate Division of the Supreme Court, Third Judicial Department. In a unanimous opinion, that court affirmed the convictions. That court ruled that the discharge of their attorneys by petitioners was unjustified and constituted a wrongful attempt to interfere with the orderly course of their trial. The court further felt that the attorney which the petitioners had attempted to hire had sought to arbitrarily dictate to the trial judge when the case would be tried. It found no infringement of the petitioners' constitutional right to the assistance of counsel.

On the issue of the alleged police brutality, the Appellate Division was of the opinion that the tentative opinion of the trial judge expressed in chambers was not a formal trial ruling and could not be reviewed on appeal.

Upon the unanimous affirmance by the Appellate Division, petitioners sought permission to carry an appeal to the Court of Appeals of the State of New York but this application was denied. Petitioners now seek a writ of certiorari so that their convictions might be reviewed by this Court.

Argument.

As respondent understands the principles controlling an application to this Court for a writ of certiorari, it is incumbent upon the petitioners to demonstrate that there are special and important reasons for granting the writ and, since this is an appliction to review a ruling of a state Court, that the state Court has decided a federal question of substance not theretofore determined by this Court or has decided it in a way probably not in accord with the applicable decisions of this Court (see Rule 19, Rules of the Supreme Court). Respondent

submits that the petitioners have failed to make such a showing and, accordingly, the writ should not issue.

The constitutional rights claimed to have been infringed upon are the right to the assistance of counsel guaranteed by the Sixth Amendment and the right to confront and cross examine witnesses, also guaranteed by the Sixth Amendment.

Unquestionably, petitioners had a right to the assistance of counsel and to confront and cross examine the witnesses presented against them. Respondent contends, however, that nothing which transpired in the Rensselaer County Court violated the petitioners' Sixth Amendment rights.

When the record of the proceedings had at the trial level is examined and carefully scrutinized, it is clear that both petitioners deliberately attempted to manipulate their Sixth Amendment right to the assistance of counsel in such a manner so as to delay, obstruct and impede the orderly procedure of their trial.

Observe what transpired in the Trial Court below. Within days after their arrest in January of 1973, both petitioners hired private counsel of their own choosing. Both attorneys were knowledgeable and experienced in the defense of criminal cases and they immediately undertook and pursued with great vigor the defense of petitioners. They obtained preliminary examinations despite the fact that their clients had theretofore waived same. They made varied and numerous motions for dismissal, discovery, bills of particulars, suppression of their confessions and suppression of identification testimony. As a result of their efforts, the People abandoned any thought of using the written confessions made by peti-

tioners. Moreover, the attorneys were, by their efforts, enabled to discover and examine every photograph, report and item of physical evidence which the People had in their possession.

During some of the time when he represented the petitioner Lutz, his attorney, E. Stewart Jones, Jr., had served as a Special Prosecutor for Rensselaer County on other, unrelated criminal cases. His active services ended in June of 1974 when he successfully prosecuted a murder case. There was widespread coverage in the news media about Mr. Jones' prosecutorial efforts in the murder case and there was hardly a person in the area who did not know of his role. And most of the excellent defense motions were made by him while so serving as such Special Prosecutor.

In the summer of 1974, Judge John J. Clyne was assigned to preside at the trial of this case. He advised the Special Prosecutor and defense counsel that they must be ready at the opening of the September trial term. When the trial term opened the petitioners plea bargained but the results were not to their liking and the bargaining ended.

To the knowledge of petitioners, Judge Clyne had a reputation among the legal community of being stern in the sentences he imposed in criminal cases once the guilt of the accused had been determined. Also to the knowledge of petitioners, Judge Clyne's assignment to the Rensselaer County Court was for but a short time, due to end about September 19, 1975, as respondent recalls it. Respondent believes that these two considerations formed the basis of all that transpired below.

On the very eve of trial, petitioner's counsel stayed the trial and moved for a change of venue. The motion

was denied and the stay lifted. In the meantime the identification suppression hearing had proceeded before Judge Clyne. It had been directed by Judge Clyne that the hearing and the trial be held as one proceeding, with the hearing taking place first and then the trial-in-chief commencing immediately thereafter. When it became plain to petitioners that their last efforts to delay the trial had failed, they, in desperation, discharged their attorneys and attempted to employ other counsel. The hearing phase of the trial had already begun and an entire day of testimony had been taken when this discharge took place.

The reasons given by petitioners for the discharge of their counsel were patently false and spurious. Petitioner Lutz stated that Mr. Jones had been acting as a Special Prosecutor and there was a conflict of interest between his duties as such Special Prosecutor and his duties as defense counsel. In fact, there was no such conflict because there was not the remotest connection between the cases Mr. Jones prosecuted and this case. And if petitioner Lutz had no basis in fact to assert that such a conflict existed, *a fortiori* petitioner DeChiaro had no basis either, for his counsel, Mr. O'Connor, had never served as a Special Prosecutor and he was discharged merely because of his association with Mr. Jones.

It is quite clear that this discharge was groundless and, in fact, conceived in bad faith by petitioners solely to delay the trial and escape from the jurisdiction of Judge Clyne, whom they feared. The bad faith of petitioners is underscored by the fact that they would not even permit Mr. Jones and Mr. O'Connor to continue on with the suppression hearing despite the fact that Mr. Jones and Mr. O'Connor had represented them with great effectiveness and vigor on the first day of the hearing. Petitioners had deliberately undertaken to defy the Trial Court and to subvert and destroy their trial.

The hearing phase of the trial was completed with both petitioners refusing to participate. The matter was then adjourned to await the arrival of the new defense counsel from Boston. It is, respondent believes, most significant that when the discharge of Mr. Jones and Mr. O'Connor was announced, without warning, to the Trial Court, the Court was led to believe that Mr. Alch had already agreed to represent petitioners. If such impression had not been given, it is unlikely that the Court would have permitted the discharge in question.

The Trial Court stood in recess all during the day of September 11, 1974, awaiting Mr. Alch. When he appeared at the end of that day, it developed that he had not yet agreed to represent petitioners and would not do so unless he had a continuance of seven days. The Trial Court, having in mind the duration of its assignment in Rensselaer County and the limited time available for trial, offered a four-day continuance in the taking of proof so long as a jury were selected in the interim. Mr. Alch stated that he *could* be ready in this time, but that *he* would not be satisfied with this amount of preparation. It was during this discussion in chambers that Mr. Alch stated that he wanted to investigate the allegations of police brutality as bearing on the motive of the prosecution witnesses. The Court expressed the opinion that such evidence was wholly collateral and not admissible.

In any event, having failed to dictate to the Trial Court when the matter would be tried, Mr. Alch refused to enter the case. This left petitioners with no counsel and so the Trial Court, realizing that Mr. Jones and Mr. O'Connor were the only lawyers available who were thoroughly familiar with the case and prepared to defend, assigned them to represent petitioners. But petitioners knowingly refused to accept Mr. Jones and Mr. O'Connor

even as their assigned counsel and advised the Trial Court, in effect, that if they could not have Mr. Alch as their attorney and on Mr. Alch's terms, then they would not accept any attorney and would not participate in the trial at all.

Quite clearly the petitioners adopted the strategy of gambling all that their convictions would be reversed because of the fact that they were unrepresented by any attorney during the remainder of the trial. It was the gamble of desperate men. However, the magnitude of the proof against them was such that perhaps this was the best defense available to them. In any event, petitioners sat mute during the trial and were convicted after the jury heard the overwhelming evidence against them.

It is respondent's position, that, while the Sixth Amendment right of an accused to the assistance of counsel must be jealously guarded, still, no defendant should be permitted to manipulate such right for the purposes of delaying, obstructing and destroying his own trial. The Courts have uniformly prevented any effort to prostitute the Sixth Amendment in such a way. See *Arellanes v. United States,* 302 F. 2d 603 (9th Cir. 1962). In fact in *Arellanes v. United States,* 326 F. 2d 560 (9th Cir. 1964), the Court commented that similar conduct to that which here occurred in the Court below can amount to a waiver of the right of counsel and respondent contends that such conduct did constitute such a waiver. See also *United States v. Cozzi,* 354 F. 2d 637 (7th Cir. 1966); *United States v. Bentvena,* 319 F. 2d 916, 936 (2nd Cir. 1963), cert. den. *sub nom. Ormento v. United States,* 375 U. S. 940, 84 S. Ct. 345, 11 L. Ed. 2d 271; *Leino v. United States,* 338 F. 2d 154 (10th Cir. 1964); *Glenn v. United States,* 303 F. 2d 536, 540-541 (5th Cir. 1962); *United States v. Sperling,* 506 F. 2d 1323 (D. C. Cir. 1974); *United States v. Arden,* 252 F. 2d 491 (2nd Cir. 1958).

And in *United States v. Abbamonte,* 348 F. 2d 700 (2nd Cir. 1965), the Court made it clear that where the defendant refuses to accept counsel, he can be ordered to trial without counsel.

Petitioners' bad faith in discharging their attorneys for the purposes of the delay and obstruction and subversion of their trial should remove from the consideration of this Court any plea by them that their right to counsel was infringed upon by the Trial Court. Once their trial had started, they had no absolute right to discharge their attorneys and demand a continuance. *United States v. Fay,* 348 F. 2d 705 (2nd Cir. 1965); *Swope v. McDonald,* 173 F. 2d 852 (9th Cir. 1949), cert. den. 337 U. S. 960, 69 S. Ct. 1522, 93 L. Ed. 1759.

Any such application for such discharge and continuance was one addressed to the discretion of the Trial Court. *Smith v. United States,* 353 F. 2d 838 (D. C. Cir. 1965). Respondent contends that there was no clear abuse of discretion by the Trial Court. When the petitioners indicated that they had hired successor counsel who would be prepared to adhere to the Court's preannounced trial schedule, the Court permitted the withdrawal of prior counsel, albeit reluctantly. When successor counsel appeared, it offered such counsel a four-day continuance in the taking of proof so long as a jury was selected. In this connection, it must be remembered that successor counsel was accompanied by a skilled and capable trial assistant and a trained investigator was also in their employ. The Trial Court's offer was not unreasonable. There was no abuse of discretion and in the absence of a clear abuse of discretion, the action of the Courts below should not be reversed and, indeed, should not even be reviewed by this Court. *Neufield v. United States,* 118 F. 2d 375 (D. C. Cir. 1941), cert. den.; *Ruben v. United States,* 315 U. S. 798, 62 S. Ct. 580, 86

L. Ed. 1199; *Avery v. State of Alabama,* 308 U. S. 444, 60 S. Ct. 321, 84 L. Ed. 377; *Johnson v. United States,* 291 F. 2d 150 (8th Cir. 1961); *Cleveland v. United States,* 322 F. 2d 401, 402-403, cert. den. 375 U. S. 884, 84 S. Ct. 841, 11 L. Ed. 2d 114 (1963).

And see *Ungar v. Sarafite,* 376 U. S. 575, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964), where this Court found no abuse of discretion in a five-day period of time for counsel to prepare for the defense of a criminal type proceeding.

Petitioners now additionally complain because the Trial Court did not assign Mr. Jones and Mr. O'Connor to be present in the courtroom to assist them during the remainder of the trial. But, they strenuously protested when the Court attempted to do this very thing and the Court had no right to force counsel upon them over their strongly voiced objections. *Brown v. United States,* 264 F. 2d 363 (D. C. Cir. 1959), cert. den. 360 U. S. 911, 79 S. Ct. 1299; *Johnson v. United States,* 318 F. 2d 855 (8th Cir. 1963). If the Trial Court had done so, the claim of the petitioners would have been that *this* constituted an infringement upon their rights. They had no right to seek to place the Trial Court in a position where they could later claim that it was in error whichever course it adopted.

The main cases relied upon by petitioners are not in point. In *Patton v. State of North Carolina,* 315 F. 2d 643 (4th Cir. 1963), the Court found that the defendant had reasonable grounds for discharging his attorney and, moreover, the Trial Court had refused to assign counsel thereafter. In the case at bar, petitioners' discharge of their counsel during trial was groundless and done in bad faith and the Court attempted, without success, to thereafter assign counsel. In *United States v. McMann,* 252

F. Supp. 539 (N. D. N. Y.), the defendant's retained counsel had been harassed and badgered by the Trial Court to the point where, on the verge of collapse, she withdrew from the case. Thereafter, when defendant's family was unsuccessful in retaining other counsel, the defendant refused assigned counsel and attempted to conduct his own defense. Neither case supports the petitioners' position that, in the factual situation here presented, their right to counsel was infringed. Both petitioners discharged their attorneys groundlessly and refused to accept competent, prepared assigned counsel and refused to participate in the trial. They have no basis to complain. This Court should not take cognizance of their plight for they alone are the authors of such plight.

Petitioners also attempt in their petition to raise the issue that their Sixth Amendment right to confront and cross examine witnesses was infringed upon. The problem here, of course, is that no such trial rulings were ever made because the petitioners, having refused counsel, sat mute. Therefore, nothing is preserved to them on appeal. *United States v. Bando,* 244 F. 2d 833, 845-846 (2nd Cir. 1957), cert. den. 355 U. S. 844, 78 S. Ct. 67, 2 L. Ed. 2d 53. Moreover, no such rulings were ever made by the Trial Court. In an off-the-record, in-chambers discussion with counsel, the Trial Court advanced a tentative opinion as to the admissibility of certain evidence—were it to be offered. Merely because this was later alluded to by the Trial Court when discussing with Mr. Alch on the record whether he would enter the case, does not transform this opinion into a reviewable trial ruling. Nor does the comment made by petitioner Lutz to the effect that *if* he was represented by counsel and *if* he was participating in the trial he would offer certain evidence, constitute a reviewable trial ruling.

Respondent has no quarrel with the cases cited by petitioners on this issue. Respondent merely states that they

have no applicability to the facts at hand where petitioners sat mute and refused to participate in the trial and, therefore, never raised as an issue that which they now seek to have reviewed by this Court.

In opposing petitioners' application for a writ, respondent also relies upon the following cases: *People v. O'Neill,* 179 P. 2d 10, 78 Cal. App. 2d 888, cert. den. *O'Neil v. State of California,* 333 U. S. 858, 68 S. Ct. 728, 333 U. S. 858, 92 L. Ed. ; *Sanchez v. United States,* 311 F. 2d 327 (9th Cir. 1962), cert. den. 373 U. S. 949, 83 S. Ct. 1678; *People v. Higgins,* 23 A. D. 2d 504 (N. Y.), aff'd 16 N. Y. 2d 751; *People v. Davis,* 21 A. D. 2d 375 (N. Y.), lv. to app. den.; *People v. Reynolds,* 39 A. D. 2d 812 (N. Y.).

Conclusion.

It is respectfully submitted that petitioners have wholly failed to sustain their burden of establishing under Rule 19 that there are special and important reasons why the writ should be granted. There is no showing that the New York Court has decided a federal question of substance not heretofore determined by this Court or in a way not in accord with the applicable decisions of this Court. The issues presented to the Trial Court were matters addressed to its sound discretion. No clear abuse of discretion has been demonstrated. A writ of certiorari should not issue.

Respectfully submitted,

DONALD J. SHANLEY,
Special Prosecutor,
Rensselaer County, New York,
35 First Street,
Troy, N. Y. 12180